IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 493

J. L. ENOCHS, DISTRICT DIRECTOR OF INTERNAL REVENUE,

Petitioner,

versus

WILLIAMS PACKING & NAVIGATION CO., INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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COMMENT ON QUESTION PRESENTED.

Judge Rives in his dissent and the government in its brief express apprehension that the majority opinion, affirming the lower Court, constitutes a great departure from the *rationale* of *Miller v. Nut Margarine Co.*, 284 U. S. 498. We think this concern is misplaced. In every case concerning a taxpayer's efforts to enjoin the assess-

ment or collection of a tax the Court has recognized the ancient policy of the government to require the taxpayer to pay first and litigate later, has examined closely the contention that the tax is illegal, and given particular scrutiny to the alleged "exceptional and extraordinary" circumstances on which a request for equitable relief is predicated. In none of the cases in which the taxpayer has prevailed has the government conceded to the taxpayer that any one or all of the requirements declared in *Miller* have been met.[1]

In short, it can be expected that whenever a taxpayer prevails in such a suit as this, the government will urge that the decision presents a threat to the orderly collection of the government's revenue, and that it is in conflict with the numerous decisions denying equitable relief to the taxpayer.

The District Court and the majority of the Court of Appeals did not intend to depart from *Miller*, nor did they do so. Judge Rives and the government in its brief treat this case as one which determined the nonliability of a tax, rather than the imposition of an exaction in the guise of a tax. The imposition of the tax itself has always been treated by respondent as illegal.

THE ILLEGAL ASSESSMENT.

What constitutes the imposition of an illegal tax is a matter which the government defines in the narrowest

[1] **Midwest Haulers v. Brady** (CC6th 1942) 128 F. (2d) 496; **John M. Hurst & Co. v. Gentch** (CC 6th 1943) 133 F. (2d) 247. In both cases the taxpayer sought and obtained an injunction against the collector, enjoining him from collecting FICA and FUTA taxes. In **Brady**, the taxpayer owed some of those taxes, and the suit was brought for the purpose of enjoining the collection of additional taxes.

terms possible . . . it is a tax "the imposition of which is arbitrary and capricious and could by no legal possibility be assessed." (Petitioner's Brief, p. 6.) That language is taken from *Miller*. It is the language of the Supreme Court of the United States having the advantage of a view of the matter in retrospect. Before that conclusion could be reached, the taxpayer was resisted by the government in his efforts to advance his contentions in the lower Court, the Court of Appeals and the Supreme Court of the United States.

Miller did nothing to the margarine act,[2] nor were constitutional issues decided. The Court clearly stated its reasons in the following language:

> "This is not a case in which the injunction is sought upon the mere ground of illegality because of error in the amount of the tax. The article is not covered by the Act." *Miller v. Nut Margarine, supra, p. 510.* (Emphasis added.)

On the question of illegality of the tax, we find that the majority opinion of the Fifth Circuit is in harmony with this Court's decision in *Miller*. In both cases we have a valid tax statute but an illegal assessment against the individual. The illegality arises by virtue of the fact that the taxpayer simply does not owe the tax. In *Miller* and in this case, the determination that the tax is not owed was not conceded by the government, but resisted with all of the resources available to it. In both cases it was obvious to the taxpayer that the tax was

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[2] "But having regard to McCray v. United States, 195 U. S. 27, 59, 49 L. ed. 78, 97, 24 S. Ct. 769, 1 Ann. Cas. 561, we treat the imposition laid by the Act upon oleomargarine as a valid excise tax." Miller v. Standard Nut Margarine Co. 284 U. S. 498, 506.

illegal, but before that position could be sustained, the taxpayer was forced to a full trial of all of the legal and factual issues; and an appeal to the Court of Appeals, to secure a decision that the taxpayer did not owe a tax under the applicable statute. In both cases the taxpayer urged a complete immunity from the tax, not a partial immunity or the right to a determination of the correctness of the assessment. In view of the factual determination by the lower Court, on the issue of the status of the captains and fishermen, the affirmance of that conclusion by the Court of Appeals and the absence of any comment by Judge Rives in his dissent on that vital issue, the first requirement of *Miller* that the tax must be illegal should be taken as satisfied by this record. That being true, this case is distinguishable from *Kaus* on that ground alone. In the latter case the lower Court determined that the plaintiff had not sustained his burden to show an illegal tax and unusual and extraordinary circumstances. Refusing to pass on the relationship of the cabdrivers to the taxpayer, the Court of Appeals felt that the lower Court lacked jurisdiction to enjoin the collection of the taxes. We do not know what the decision of the Court of Appeals would have been had the lower Court found that the cabdrivers were not the employees of the taxpayer.

SPECIAL AND EXTRAORDINARY FACTS AND CIRCUMSTANCES.

The finding by Judge Mize with respect to the effect of the assessment on the respondent is similar to the conclusions reached in *Miller*, *Brady*, *Gentsch* and *Lassoff*.[3]

[3] If the levy had been made upon the assets of the corporation it would have wrecked the corporation and thrown it into bankruptcy a-

The lower Court found as a fact that petitioner ". . . has always assumed that it was not liable for taxes of this nature for the reason that the relationship of employer and employee did not exist, and prior thereto no contention by the government had been made to it." The lower Court considered that the action of the government in contending that the fishermen in and around Biloxi, Mississippi, and the Mississippi Gulf Coast, were not employees of the packers[4] was in the nature of a declaration against interest. The Treasury Regulations adopted pursuant to the subject acts do not specifically define the relationship of the fishermen and the packers, but leave application of the act to be determined by common law tests. In a case of considerable interest to the seafood industry in Biloxi, the same judge who tried this case accepted the theory advanced by the government to the effect that fishermen and captains were not employees of the packers, utilizing the common law tests. His rulings in support of the government were affirmed by the Fifth Circuit.[5]

Other agencies of the government have concluded under circumstances similar to the facts in this case that

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it did not have and does not have assets with which to pay the taxes and not sufficient assets with which it could have negotiated a loan to pay the tax. In **Miller** this court said ". . . the enforcement of the act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law." In **Brady** "a sale of (taxpayer's) assets would completely destroy its business." In **Gentsch** ". . . if collection is enforced by distraint the appellant will be ruined in its business and forced to close its mine." And in **Lasseff** ". . . the liens and threatened sales will be disastrous to (taxpayers) in that their properties will be sacrificed and their businesses so handicapped as to be made worthless."

[4] **Gulf Coast Shrimpers and Oystermens Association** *v.* U. S. (5th Cir.), 236 F. (2d) 658, cert. denied 352 U. S. 927.

[5] supra.

captains and fishermen are not employees of the packers to whom they sell their product."

On the need for equitable relief the Court of Appeals stated as follows:

> "A peculiar equity existing in appellee's favor—which the government does not dispute except on the ground that the facts did not support the court's findings arises from the effort of the Director to enforce taxes against the corporation by coercion of its stockholders to pay the corporation's supposed indebtedness. The Director did not assess the tax against the stockholders or the partnership, but confined his effort to reach the assets of those not made parties to the assessment or brought into this action, by this indirect proceeding aimed at collecting the money from those held by the court not to be liable for it."

We would like to comment on those remarks: The assessment of the subject tax was against respondent. The respondent was a valid, subsisting corporation, organized for the primary purpose of providing a vehicle for the capture of seafood in the waters of Louisiana. The government never appraised the respondent of any doubt that the tax was owed by the respondent. No affirmative defense attacking the separate entity status of respondent was ever filed. During the trial counsel for petitioner probed into the affairs of a partnership, not a party to the

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[4] Cases cited in footnote 3, opinion of the majority in **Enochs v. Williams Packing & Navigation Co., Inc.**, 291 F. (2d) 402. These decisions are consistent with this case and the case of **Gulf Coast Shrimpers & Oyster Ass'n. v. U. S.** 236 F. (2d) 658.

suit for the purpose of showing that the partnership might be financially able to pay the assessment. This was the so-called theory of integrated operation, the nub of which was that if individuals not parties to the suit could in some way raise in excess of $41,000.00, permitting the respondent the use of that money, respondent could ultimately sue for its refund. Here was a complete shifting of liability from the corporation to individuals. When the government failed to support its integrated operation theory in the Court, without notice to the partnership, and for reasons known only to the government,[7] the tax which had always been treated as the obligation of respondent was shifted to the DeJean Packing Company, a partnership. The suit of *DeJean Packing Company v. Enochs*, No. 2116, cited in footnote eleven, page 9, of the government's brief followed.

We think these equities are more than adequate to bring this case within the tests set out in *Miller*, *Brady*, *Gentsch* and *Lassoff*.

THE ABSENCE OF SERIOUS CONFLICT AMONG THE CIRCUITS.

If there is conflict between this case and *Kaus*, then *Kaus* also conflicts with *Midwest Haulers v. Brady*,[9] *John M. Hurst & Co. v. Gentsch*,[9] and *Lassoff v. Gray*.[10]

[7] Its action in making that assessment against DeJean Packing Company gave rise to the suit styled DeJean Packing Co. v. Enochs, No. 2116, cited in footnote eleven, page nine of the government's brief. The assessment was made without prior investigation, notice or hearing.

[8] 128 F. (2d) 496.

[9] 133 F. (2d) 247.

[10] 266 F. (2d) 745.

We think the last three cases are more in harmony with *Miller* than is *Kaus*. In *Miller*, *Brady*, *Gentsch*[11] and *Lassoff*,[12] the assessments were made under a valid statute. The taxpayers resisted the payment of the taxes assessed on the grounds that they did not owe the taxes. On motions to dismiss in *Brady*, *Gentsch* and *Lassoff*, the taxpayers' contentions were ultimately sustained. In none of those cases did it appear that the Collector was arbitrary; neither were the assessments malicious nor capricious. As in *Miller*, the taxpayers simply did not owe the taxes levied. *Miller*, *Brady*, *Gentsch* and *Lassoff* are instances of taxpayers successfully resisting payment of taxes which they believe they did not owe. In *Kaus*, the plaintiff was ". . . a taxpayer resisting payment of taxes which he believes that he does not owe."[13] For that reason his suit was dismissed. *Kaus* disqualified the plaintiff for reasons which were accepted by the courts in *Miller*, *Brady*, *Gentsch* and *Lassoff*.

This case does not conflict with *Mensik v. Long*[14] or with *Homan Mfg. v. Long*.[15] In *Mensik* the assess-

[11] In **Brady** and **Gentsch**, the suit involved FICA and FUTA taxes.

[12] The taxes in **Lassoff** were assessed under Internal Revenue Code of 1954, sect. 4401 (26 USCA 4401), imposing a tax on gambling. Plaintiffs contended that they did not have ". . . and cannot acquire funds or credits sufficient to pay the assessments, or provide a bond to guarantee payment thereof and are therefore deprived of any means of contesting the illegal taxes." Court stated: "When we consider that the legality of the assessments of these taxes cannot be tested as can income taxes, but must be bonded or paid before they can be contested, it is easy to see that in many instances where very large assessments are imposed many individuals would not have any available remedy to resist the sale of the properties or to test the legality of the tax, unless they have resort to a court of equity."

[13] **Kaus v. Huston**, 120 F. (2d) 183, 185.

[14] 261 F. (2d) 45.

[15] 242 F. (2d) 645.

ment was for income taxes on unadjusted capital returns, proceeds from loans, premiums collected and passed on to insurance carriers and charitable contributions. The assessing official may have erroneously assessed all or part of the items included in the assessment; only a trial would have developed the taxpayer's liability. The taxpayer had adequate remedies at law; if he were diligent he could elect to pay and sue, or could go to tax court. In this case, and in *Miller*, *Brady*, *Gentsch* and *Lassoff*, it was "neck or nothing"; either all of the tax was owed or none of it, and the remedy of pay first, sue later was not adequate.

It is difficult to perceive of any conflict between this case and *Homan*. In the latter the taxpayer sought and obtained an injunction, enjoining the Collector from pursuing a jeopardy assessment. The injunction was granted on the plaintiff's motion for summary judgment. Reviewing that procedure, the Court of Appeals said:

> "Assuming without deciding, that there is enough case law authorizing equitable relief in the face of sect. 7121, we think preemptory relief through the vehicle of summary judgment was incorrect. Because if the court has equitable powers, regardless of Sect. 7421, they are delineated by a handful of prior opinions making it necessary to determine if the Homan facts come within their ambit. For we think the judicial rubrics already inserted in sect. 7421 cannot wisely be multiplied."

The Court of Appeals reversed the cause, and remanded it for proceedings not inconsistent with its opinion, observing:

"All we have decided is that summary judgment for plaintiff was improvidently granted."

CONCLUSION.

The application for a writ of certiorari should be denied, for the reason that this case represents no departure from *Miller v. Nut Margarine Co.*, 284 U. S. 498.

Respectfully submitted,

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CERTIFICATE.

I hereby certify that a copy of the foregoing brief has been served on the Solicitor General, Department of Justice, Washington 25, D. C., by air mail, postage prepaid, this ..... day of ....., 1961.

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